

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
ADOLPH AND FRANCES LOVLER	:	DETERMINATION
	:	DTA NO. 810044
for Redetermination of a Deficiency or for	:	
Refund of Personal Income Tax under Article 22	:	
of the Tax Law for the Years 1986 and 1987.	:	

Petitioners, Adolph and Frances Lovler, 2880 Le Bateau Drive, Palm Beach Gardens, Florida 33410, filed a petition for redetermination of a deficiency or for refund of personal income tax under Article 22 of the Tax Law for the years 1986 and 1987.

A hearing was held before Marilyn Mann Faulkner, Administrative Law Judge, at the offices of the Division of Tax Appeals, Riverfront Professional Tower, 500 Federal Street, Troy, New York, on January 7, 1993, at 2:45 P.M., with all briefs to be submitted by March 17, 1993. The Division of Taxation submitted its brief on February 3, 1993. Petitioners have not submitted a brief. Petitioners appeared by Peter R. Newman, Esq. The Division of Taxation appeared by William F. Collins, Esq. (Gary Palmer, Esq., of counsel).

ISSUE

Whether petitioners filed a request for a conciliation conference within 90 days of the issuance date of the Notice of Deficiency.

FINDINGS OF FACT

The Division of Taxation ("Division") issued to petitioners, Adolph and Frances Lovler, a Notice of Deficiency, dated March 4, 1991, for additional income tax due for the year 1986 in the amount of \$112,652.11 plus penalty and interest for the total amount of \$190,486.28 and for the year 1987 in the amount of \$1,970.60 plus penalty and interest in the total amount of \$2,895.16.

Petitioners requested a conciliation conference.

By conciliation order dated October 4, 1991, the conferee dismissed the request on the ground that the request was not mailed until June 25, 1991 and, therefore, was late filed.

Petitioners contested the dismissal of their request for a conciliation conference by filing a petition dated October 16, 1991 with the Division of Tax Appeals. In that petition, petitioners alleged that on May 16, 1991 they filed a request for a conciliation conference; that they subsequently received a Notice and Demand for Payment of Tax Due dated June 17, 1991; and that in response to the Notice and Demand, petitioners' counsel wrote a letter dated June 25, 1991 annexing a copy of the May 16, 1991 request for a conciliation conference. The June 25 letter contained the following statements:

"On May 16, 1991, a request for a conciliation conference was made.

"Despite the timely filing of this request, my client has received a Notice and Demand for Payment of Tax Due, a copy of which is attached.

"Please mark your files to correctly record the timely receipt of the request for a conciliation conference and put a stop on any further collection."

In the petition, petitioners further alleged that the May 16, 1991 request was sent by ordinary mail in contrast to the normal practice of petitioners' counsel. The petition contained the following assertions:

"Since my file does not contain a certified mail receipt attached to my copy of the May 16, 1991 Request for Conciliation conference, I checked with the Secretary that handled the matter that day and she indicated that since there were three weeks left until the filing deadline, she sent it by regular mail. My other Secretary who usually handles all tax matters in the office was out that day. She know [sic] that all documents with filing deadlines in tax matters are routinely sent by this office via certified mail - return receipt requested, as indicated on my June 25th letter, but the other Secretary may have not been aware of that. Therefore, I have no proof of filing other than my file copy dated May 16, 1991.

"It is respectfully requested that a Conciliation Conference be held so that this matter may be litigated on the merits, and not on the failure of your mailroom or the U.S. Mail."

The Division filed an answer, dated April 3, 1992, alleging that petitioners were domiciliaries and statutory residents of New York State and that the Notice of Deficiency finally and irrevocably fixed the tax due because petitioners failed to request a conciliation conference within 90 days of the issuance of the Notice of Deficiency.

A hearing was held by the Division of Tax Appeals ("DTA") on January 7, 1993 for the sole purpose of determining whether the request for a conciliation conference was timely filed.

At the hearing, the Division submitted three separate affidavits of Donna Biondo, Jennifer Gable and Daniel D. LaFar; a copy of the Notice of Deficiency, which was dated March 4, 1991 and addressed to Adolph and Frances Lovler; and a copy of a page entitled certified record for non-presort manual mail. Typed on the one-page certified mail record was a certified number P001 060 813 listed next to the notice number L002374880 (which number also appears on the copy of petitioners' Notice of Deficiency). Next to both the certified number and notice number was the name and address of Adolph Lovler. The certified mail record page also contained the handwritten date of March 4, 1991 and a United States postal stamp dated March 4, 1991.

In the affidavit of Donna Biondo, identified as the Head Clerk of the Division's CARTS (Case and Resource Tracking System) Control Unit, she stated that she supervises the preparation for certified mailing of notices of deficiency as well as the transfer of the notices of deficiency to the District Office Control Unit of the District Office Audit Bureau from the Information Systems Management where the notices and certified record for non-presort manual mail are printed. She further stated that after the Notice of Deficiency has been mailed, a copy of the certified record with the U.S. Postal Service postmark is returned to the CARTS control unit for storage and that it was from this unit that the copy of the certified mail record containing Adolph Lovler's name and address was retrieved.¹

In the affidavit of Jennifer Gable, who is identified as a Calculation Clerk in the Division's District Office Control Unit of the District Office Audit Bureau, she stated that when

¹In her affidavit, Donna Biondo explained that when a Notice of Deficiency is issued to two taxpayers who are jointly liable, "exhibit 'A' only has the name of the primary taxpayer while exhibit 'B' contains the names of both taxpayers." In the latter part of her statement she incorrectly referred to the exhibits. The Notice of Deficiency which contains the names of both taxpayers is Exhibit "A" and the certified record, marked Exhibit "B", contains only the name of Adolph Lovler, the primary taxpayer.

a Notice of Deficiency is received from the CARTS Control Unit, it is placed in a windowed envelope with the name and address of the taxpayer visible. This envelope is then wrapped in two copies of the certified record and delivered to the Division's mailroom where the envelope is sealed, metered and delivered to a United States Post Office for mailing by certified mail. She further stated that after examination of the copy of the notice and certified record, she could state without reservation that these documents were handled by the District Office Control Unit in the manner she described.

In the affidavit of Daniel D. Lafar, who is identified as the Division's principal mail and supply clerk, he stated that he was fully familiar with the operations and procedures of the mail room and that as part of his regular duties, he supervises the staff in the mail room. He explained that the mail room clerk compares the number of envelopes to the number of statutory notices and compares the certified control numbers on the envelopes to the certified control numbers listed on the certified record. He also stated that in this case there was only one statutory notice and one envelope. He further noted that when the Division's employee delivers the envelope and certified record to the U.S. Post Office, a postal employee verifies the address and certified control number on the envelope against the address and certified control number on the certified record before affixing a dated postmark to the certified record, a copy of which is then returned to the mail room for transferral to the CARTS Control Unit.

At hearing, petitioners' counsel, Peter A. Newman, testified that on May 16, 1991 he personally mailed at the U.S. Post Office in Hicksville, New York, the request for a conciliation conference on behalf of Frances and Adolph Lovler. On cross examination, Mr. Newman responded as follows:

Q. "What type of mail did you use?"

A. "It was mail, ordinary mail."

Q. "It wasn't certified or registered?"

A. "No. That was a deviation from normal practice. And the reason it was not, it was after normal hours. I believe my secretary had gone home early that day and I

just wanted to make sure it got mailed. I'd been planning to go away and I just went out and I didn't get a certified letter, I didn't get a certification on it."

Q. "Did your clients receive the Notice of Deficiency dated March 4, 1991, that's been received in evidence?"

A. "Yes, they did. That's not a factor. The receipt of the Notice of Deficiency is not in dispute." (Tr., pp. 8-9.)

Petitioners' counsel also submitted into the record a copy of the cover letter dated May 16, 1991 that he claimed had accompanied the original request for a conciliation conference.

In brief, the Division cites three Tax Appeals Tribunal cases in support of its position that proof of ordinary mailing is insufficient as a matter of law to prove timely request where there is no actual delivery of the request.

CONCLUSIONS OF LAW

A. Tax Law § 681(a) provides that if the Division determines there is an income tax deficiency, it must mail a Notice of Deficiency to the taxpayer at his or her last known address by certified or registered mail. If such notice is properly mailed, it shall constitute a final assessment unless the taxpayer files a petition protesting the notice within 90 days of the Division's mailing the notice (see Tax Law § 681[b]; Matter of Malpica, Tax Appeals Tribunal, July 19, 1990, citing Matter of Kenning v. State Tax Commn., 72 Misc 2d 929, 339 NYS2d 793, aff'd 43 AD2d 815, 350 NYS 2d 1017, appeal dismissed 34 NY2d 653, 355 NYS2d 384, lv denied 34 NY2d 514, 355 NYS2d 1025; cf., Matter of Ruggerite, Inc. v. State Tax Commn., 64 NY2d 688, 485 NYS2d 517). The taxpayer has the option of protesting the notice by requesting a conciliation conference in lieu of filing a petition for hearing (Tax Law § 689[b]) if the 90-day period to petition for hearing has not elapsed (Tax Law § 170.3-a[a]; 20 NYCRR 4000.3[c]).

When the timeliness of a filed petition is at issue, the Division must demonstrate proper mailing (Matter of Katz, Tax Appeals Tribunal, November 14, 1991; Matter of Novar TV & Air Conditioner Sales & Serv., Tax Appeals Tribunal, May 23, 1991). To show that the notices were properly mailed to the taxpayer's last known address by certified or registered mail, the Division must provide evidence as to the general mailing procedure and the adherence to this

procedure when mailing the notices at issue (Matter of Katz, *supra*; Matter of Novar TV & Air Conditioner Sales & Serv., *supra*).

Here, the Division has demonstrated its general mailing procedure and provided evidence that this procedure was followed in this case. The Notice of Deficiency and certified record contained the same notice number of L-002374880. The postmark of March 4, 1991 on the certified record verifies that petitioners' Notice of Deficiency was mailed on that date. Petitioners do not claim that the notice was not received nor do they challenge the date of mailing. Petitioners only challenge the date the conferee "deemed" to be the date of their request for a conciliation conference. Therefore the 90-day limitations period commenced on March 4, 1991.

B. Tax Law § 691(a) provides that if a document is required to be filed within a prescribed period and is delivered by the United States Postal Service after such prescribed period, the date of the United States postmark stamped on the envelope shall be deemed the date of delivery. If the postmark on the envelope does not bear a date which falls within the prescribed period, the document will not be deemed timely filed regardless of when the document was deposited in the mail (20 NYCRR 191.1[a][2][iii][a]). Under the regulations, the sender who uses ordinary mail bears the risk that the postmark date stamped by the U.S. Postal Service will fall within the prescribed period (*id.*). This risk is obviated by the use of certified or registered mail (*see*, 20 NYCRR 191.1[b]). Accordingly, if ordinary mail is used, the sender also bears the risk that the document may not be delivered at all (Matter of Bove, Tax Appeals Tribunal, February 22, 1991; Matter of Messinger, Tax Appeals Tribunal, March 16, 1989; Matter of Sipam, Tax Appeals Tribunal, March 10, 1988). In its interpretation of the mailing rules and regulations, the Tax Appeals Tribunal has consistently held that when there is no actual delivery of the document to the Division, oral testimony or other proof of ordinary mailing is insufficient, as a matter of law, to prove timely filing of a document (*id.*). Therefore, notwithstanding Mr. Newman's testimony that he personally mailed the request for a conciliation conference on May 16, 1991, the conferee properly "deemed" the June 25, 1991

request as the date for calculating the timeliness of the request under the statute. Consequently, because petitioners' request was not filed within 90 days of the March 4, 1991 Notice of Deficiency, the DTA does not have jurisdiction to review the merits of the tax deficiency (Tax Law § 2006.4).

C. It should be noted that petitioners may not be without recourse to the extent petitioners pay the assessment and then file a timely refund claim (see, Tax Law § 687[a]), the denial of which may be subject to review if a timely petition is filed with the DTA (see, Tax Law § 2000).

D. The petition of Adolph and Frances Lovler is dismissed.

DATED: Troy, New York
April 22, 1993

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE